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5 **IN THE SUPREME COURT**
6 **STATE OF ARIZONA**

7 In the Matter of:

Supreme Court No. R-20-0009

8 **PETITION TO AMEND THE**
9 **ARIZONA SUPREME COURT**
10 **RULES BY ADOPTING A NEW**
11 **RULE: RULE 24 – JURY**
SELECTION

COMMENT OF THE STATE
BAR OF ARIZONA

12 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
13 of Arizona (the “State Bar”) hereby submits the following as its comment to the
14 above-captioned Petition.
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16 The Petition seeks to add a new Supreme Court Rule 24 to address challenges
17 for trial courts enforcing the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986) and
18 its civil counterpart *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).
19 The Petition proposes that the Court adopt Washington’s General Rule (“GR”) 37,
20 enacted by the Washington Supreme Court on April 24, 2018, following lengthy
21 study, a report, and recommendations by Washington’s “Jury Selection
22 Workgroup.”
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25 The goal of the Petition is beyond question: the elimination of racially

1 discriminatory peremptory challenges in jury selection. Recognizing the seriousness
2 of the issue, following discussions with Petitioner,¹ the State Bar's Civil Practice &
3 Procedure Committee and its Criminal Practice & Procedure Committee proactively
4 initiated the formation of a joint working group to study the Petition and evaluate
5 how these issues can best be addressed in Arizona. While Washington's approach
6 provides a helpful framework and starting point for that analysis, the State Bar
7 believes that further consideration will be helpful in developing an Arizona rule that
8 has broad support.

11 The State Bar therefore recommends that consideration of the Petition be
12 continued to the August 2021 Rules Agenda so that the State Bar's working group
13 can study the efficacy of GR 37 and other possible frameworks to achieve the
14 Petition's goal.

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17 **I. THE HOLDING IN *BATSON* AND THE CHALLENGES IN ITS ENFORCEMENT.**

18 *Batson* is among the pantheon of notable United States Supreme Court civil
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22 ¹ The State Bar's working group is comprised of members of the Criminal Practice
23 & Procedure Committee on both the criminal defense and the prosecution side,
24 members of the Civil Practice & Procedure Committee, and other interested
25 stakeholders, including the Petitioner. The State Bar understands that the Petitioner
may agree to voluntarily continue or withdraw the Petition to allow further time for
the working group to study these issues.

1 rights cases decided in the past 50 years. James Kirby Batson, a black man, was
2 indicted in Kentucky on charges of second-degree burglary and receipt of stolen
3 goods. The prosecutor used all of his peremptory challenges to remove all of the
4 black jurors. Batson moved to discharge the jury, arguing that the removal of all
5 black members of the jury violated his rights under the Sixth and Fourteenth
6 Amendments to the United States Constitution. The trial court denied the motion,
7 reasoning that litigants can use peremptory challenges to “strike anybody they want
8 to.” The jury convicted Batson and the Supreme Court of Kentucky affirmed.
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11 The Supreme Court of the United States granted certiorari and reversed. As
12 noted by the Petitioner (Petition, pp. 5-6) the opinion by Justice Powell held that
13 the Equal Protection Clause is violated where the prosecution excludes black
14 members of the jury solely on the basis of their race. *Batson* created a framework
15 for the lower courts to analyze cases of alleged discrimination in jury selection:
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- 17 • The defendant must make a prima facie showing of discriminatory
18 purpose by demonstrating that he or she is a member of a specific racial
19 group and the prosecutor has used a peremptory challenge to remove a
20 juror of the same racial group.
- 21 • The prosecutor may rebut the inference of discrimination by offering a
22 racially neutral explanation for challenging the potential juror.
- 23 • The trial court must determine whether the reasoning given by the
24 prosecutor was indeed neutrally based or merely a pretext for racial
25 discrimination.

1 Five years later, in *Powers v. Ohio*, 499 U.S. 400 (1991), the Court held that
2 a criminal defendant may object to race-based exclusions of jurors regardless of
3 whether or not the defendant and excluded jurors share the same race, reasoning
4 that a prospective juror has an independent Constitutional right to sit on a jury
5 regardless of their race. Finally, in *Edmonson, supra*, the Court held that *Batson's*
6 holding applied in civil jury cases.
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8 Decades later, many courts and commentators have argued that *Batson's*
9 framework has been ineffectual in eliminating the use of racially motivated
10 peremptory challenges. *See, e.g., State v. Holmes*, 334 Conn. 202, 204–05 (2019)
11 (“From its inception, the United States Supreme Court’s landmark decision in
12 [*Batson*] has been roundly criticized as ineffectual in addressing the discriminatory
13 use of peremptory challenges during jury selection, largely because it fails to
14 address the effect of implicit bias or lines of voir dire questioning with a disparate
15 impact on minority jurors.”); *see also* Petition at 4-5 (citing cases and articles).
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18 **II. WASHINGTON’S EXAMPLE AND THE NEED TO STUDY *BATSON*** 19 **REFORM.**

20 Washington has led the way in enacting reform to respond to this criticism.
21 In 2017, the Supreme Court of Washington adopted a “bright line rule” stating that
22 the “trial court must recognize a prima facie case of discriminatory purpose when
23 the sole member of a racially cognizable group has been struck from the jury.” *City*
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1 of *Seattle v. Erickson*, 188 Wash. 2d 721, 734 (2017). Then, on April 24, 2018, the
2 Supreme Court of Washington adopted GR 37, on which the instant Petition is
3 modeled. Later that same year, the Supreme Court of Washington applied GR 37
4 to add an “objective observer” component to the third prong of the *Batson*
5 framework:
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7 The question at the third step of the *Batson* framework is
8 not whether the proponent of the peremptory strike is
9 acting out of purposeful discrimination. Instead, the
10 relevant question is whether “an objective observer could
11 view race or ethnicity as a factor in the use of the
peremptory challenge.” If so, then the peremptory strike
shall be denied.

12 *State v. Jefferson*, 192 Wash. 2d 225, 249 (2018) (applying GR 37).

13 Appellate courts in other states have cited to Washington and GR 37 to call
14 for reforms to the *Batson* framework. *See, e.g., People v. Bryant*, 40 Cal. App. 5th
15 525, 548 (Ct. App. 2019), review denied (Jan. 29, 2020) (Humes, P.J., concurring)
16 (“The State of Washington has shown that other reforms are also possible.”); *State*
17 *v. Veal*, 930 N.W.2d 319, 340 (Iowa 2019), reh’g denied (July 15, 2019) (Wiggins,
18 Justice, concurring in part and dissenting in part) (“In the majority of the cases, the
19 reasons given by prosecutors in response to a *Batson* challenge appear to be
20 pretextual. Washington General Rule 37 . . . *helps but does not solve* the problem.”)
21 (emphasis added); *State v. Curry*, 298 Or. App. 377, 389, (2019) (“Washington’s
22 experience, and whether a similarly concrete set of rules would improve our
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1 handling of peremptory challenges, are *questions that may be appropriate for the*
2 *Council on Court Procedures and the legislature to consider.*”) (emphasis added).
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4 In addition to the judicial caution in Iowa and Oregon, at least two states are
5 actively examining *Batson* reforms in the task force and work group setting:
6 California and Connecticut. *See, e.g., Holmes, supra*, 334 Conn. at 206 (creating a
7 “Jury Selection Task Force, appointed by the Chief Justice, to consider measures
8 intended to promote the selection of diverse jury panels in our state’s court-
9 houses”); Announcement of the Supreme Court of California, January 15, 2020,
10 available at: [https://newsroom.courts.ca.gov/](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20200/SupCt20200129.pdf)
11 [internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20200/SupCt2](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20200/SupCt20200129.pdf)
12 [0200129.pdf](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20200/SupCt20200129.pdf).
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16 CONCLUSION

17 Given the seriousness and importance of the issues, Arizona should join
18 Washington and other states in actively studying how *Batson* can be more
19 effectively enforced in our trial courts. Accordingly, the State Bar recommends
20 continuing the Petition to the August 2021 Rules Agenda to allow the joint working
21 group of its Criminal Practice & Procedure and Civil Practice & Procedure
22 Committees, along with other stakeholders, to study the issue—to include
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1 examining the successes and challenges in implementing Washington's GR 37, as
2 well as exploring other possible frameworks.²

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4 In recommending continuing the Petition, the State Bar does not mean to
5 discount the urgency in eliminating the specter of racial discrimination in the jury
6 selection process. The State Bar believes, however, that the collective experience
7 of this working group will aid the Court in examining how reforms can be most
8 effective in achieving *Batson*'s objectives in Arizona's trial courts.
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10 RESPECTFULLY SUBMITTED this 1st day of May, 2020.

11 /s/ Lisa M. Panahi
12 Lisa M. Panahi
13 General Counsel

14 Electronic copy filed with the
15 Clerk of the Supreme Court of Arizona
16 this 1st day of May, 2020.

17 by: Patricia Seguin
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22 ² For example, although Washington's Jury Selection Workgroup identified several
23 recommendations, there was not complete consensus. The Washington Jury
24 Selection Workgroup's final report is available at
25 <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf>.